FOR ARGUMENT



No. 77-5992

In the
# Supreme Court of the United States
OCTOBER TERM, 1978

FRANK O'NEAL ADDINGTON,
*Appellant,*
*vs.*
THE STATE OF TEXAS,
*Appellee.*

On Appeal from the Supreme Court of Texas.

## BRIEF FOR THE STATE OF ILLINOIS AS AMICUS CURIAE

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## INTEREST OF AMICUS CURIAE

The State of Illinois has some 12,000,000 citizens. Last year nearly 6,700 residents were the subject of involuntary hospitalization proceedings and another 16,000 sought in-patient care on their own. The Illinois Attorney General represents the Illinois Department of Mental Health and Developmental Disabilities, the major single provider of psychiatric care in the state. The State's Attorney of Cook County was responsible for representing the interests of the People of the State of Illinois in

nearly 4,000 of these mental health cases filed in 1977. Illinois has consistently been in the forefront of protecting mentally disabled persons through comprehensive, thoughtful and progressive legislation and programs. The Illinois Mental Health Code of 1967 was considered one of the most progressive in the nation. That code, supplemented by amendments, was reviewed carefully by a panel of 82 experts appointed by the Governor in 1973. Following the report of that study, published in November of 1976, a program of legislative reform was initiated. On September 5, 1978, Governor James R. Thompson signed into law a comprehensive package of legislation designed to not only afford the best possible protection for all citizens of this state, but to require the most freedom in terms of least restrictive alternative settings, for those adjudicated to be subject to involuntary treatment. These new laws stand as a model for effective, humane, and progressive treatment of the mentally disabled.

It is because of Illinois' intense involvement with and concern for the mentally afflicted that this State, through its Attorney General and through the State's Attorney for the largest county in the jurisdiction, respectfully file this brief of *amicus curiae*.

## QUESTION PRESENTED

Whether mental health legislation designed to protect the rights of the mentally disabled and the interests of the citizens of a State and the due process clause of the Fourteenth Amendment should be construed so as to require proof beyond a reasonable doubt in proceedings instituted to involuntarily treat an individual.



## SUMMARY OF ARGUMENT

It is the position of the State of Illinois that the due process clause of the United States Constitution, as applied to the States, does not require the application of the standard of proof beyond a reasonable doubt in civil commitment hearings.

Although proof beyond a reasonable doubt is required by due process mandates in criminal cases, the utilization of this burden of proof in civil, mental health proceedings would be burdensome and, perhaps, counterproductive. Involuntary treatment hearings are not punitive in nature. The purpose of enlightened mental health laws is treatment oriented and commitment statutes have been enacted to protect the rights and interests of all citizens. The impact of requiring proof beyond a reasonable doubt might well be that many of those in need of judicial intervention would be deprived of their right to treatment.

Many freedoms and liberties are infringed upon as a result of judicial action without the requirement of proof beyond a reasonable doubt. Violation of conditions of probation cases have passed the Constitutional muster by this Court without the application of the strictest, criminal standard of proof being applied.

The issue of the applicable standard of proof in mental health cases has been confronted by many Federal and State courts. While the results are varied, they may be harmonized by reviewing the local definitions of standards of proof. Proof by clear and convincing evidence—when defined as significantly more rigorous than a mere preponderance of evidence—has withstood the demands of due process in mental health cases. In Illinois, "clear and convincing evidence" is the highest standard of proof

afforded in any civil case. The effect of imposing proof beyond a reasonable doubt might well "criminalize" the civil procedure established for involuntary mental health treatment hearings.

Finally, the State of Illinois submits that the imposition of proof beyond a reasonable doubt is unnecessary to protect the rights of the mentally disabled. The laws of Illinois relating to involuntary psychiatric treatment are and have been progressive and patient oriented. Notwithstanding the present Mental Health Code, Illinois' legislature has recently enacted a new body of laws which provide a panoply of safeguards for the rights of patients. A careful examination of the protections afforded mental health care recipients under this new code reveals that requiring proof beyond a reasonable doubt will add no novel aspect to patient freedoms. In fact, the use of a criminal standard of proof in commitment cases may work to the detriment of those, previously established, patient rights.



## ARGUMENTS

### I.

### THE STANDARD OF "PROOF BEYOND A REASONABLE DOUBT" IS INAPPROPRIATE IN CIVIL COMMITMENT PROCEEDINGS.

It is well recognized that the standard of "proof beyond a reasonable doubt" is appropriate, in both criminal and juvenile proceedings, to adequately insure due process. *In re Winship,* 397 U.S. 358 (1970). In the case before this Court, the Appellant urges that this standard be extended to civil commitment cases. This argument has been recently rejected by the Illinois Supreme Court in *In re Stephenson,* 67 Ill. 2d 544, 367 N.E.2d 1273 (1977).

Mental health commitment cases must be distinguished from criminal and juvenile matters. The most obvious distinction is that of purpose. Clearly, no punitive element is implied or intended in civil, mental health commitments. *Cf. Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). When necessary, the state must act to exercise either the police power vested in it or the authority under *parens patriae* to protect its citizens. "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky* v. *Board of Regents,* 347 U.S. 442 at 449 (1953).

Understanding the basic theory by which a state enacts and enforces a mental health code, we should consider the requirements of due process. In *Stephenson, supra,* the Illinois court did not ignore the principle of due pro-

cess but responded by carefully balancing its mandates with the intentions of the commitment laws. "Due process . . . is a flexible concept and depends, at least in part, on the circumstances of the particular matter in issue." *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) as cited in *Stephenson* at 1276. A rigid application of due process to mental health cases would likely result in the denial of treatment, a right established by the Illinois Mental Health Code. Ill. Rev. Stats. 1977, Ch. 91½ §12-1.

The standard of proof in Illinois commitment cases is logically distinct from the standard required in criminal matters. That which is sought to be proved is quite different in the two areas in that a criminal trial is conducted to establish the guilt or innocence of a person with respect to a specific, demonstrative act. Evidence—physical, documentary and testamentary, is presented to provide a logical basis for determining whether an act has been committed or omitted. Proof beyond a reasonable doubt is possible and practical under such circumstances.

However, in a mental health proceeding, the issue presented is whether the person is suffering from a mental disorder and, consequently, expected to be dangerous to ones' self or to others or unable to care for ones' self. Ill. Rev. Stats. 1977 Ch. 91½ §1-11. This issue is more complex and frequently less demonstrative than that presented in a criminal proceeding. Consequently, a much more sensitive and difficult proposition must be proved.

In *Robinson* v. *California* 370 U.S. 660 (1961) this Court rejected the notion that one could be criminally punished for the status of being addicted to narcotics. An essential problem in establishing criminal guilt of a "status offense" is proving such a proposition beyond a reasonable doubt. Mr. Justice Harlan, in a concurring



opinion in *Robinson,* stated that ". . . the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics." *Ibid* at 678. While the Court struck the statute it did favorably discuss alternatives including the possibility of "compulsory treatment". *Ibid* at 665.

Mental health cases require that proof of a mental disorder be present before involuntary hospitalization may occur. Clearly, the task of establishing the presence of a mental disease would be more difficult and, in many cases, impossible if proof beyond a reasonable doubt was the applicable burden. The presence of a mental disorder is a concept developed by the psychiatric profession and is a function of societal norms and deviations, environment and the human thought process. In the courtroom mental illness is established by expert opinion, utilizing whatever relevant facts are available. In criminal cases, however, the commission of an act is nearly always founded on facts and not opinions. Notwithstanding this difficulty in proof, society must reckon with the fact that mental afflictions occur and the judicial process is often the only vehicle available to insure prompt and satisfactory treatment as well as protection of all citizens. The imposition of the strictest standard of proof threatens to thwart the purpose and goals of our mental health laws to the detriment of the very sector of society it has been designed to protect.

## II.

## THE STANDARD OF PROOF NECESSARY IN MENTAL HEALTH COMMITMENTS CAN BE HARMONIZED WITH THE LOCAL DEFINITION OF "CLEAR AND CONVINCING PROOF" SO AS TO MAINTAIN BOTH DUE PROCESS AND REALISTIC COMMITMENT LAWS.

The establishment of the appropriate burden of proof is in most cases left to the judiciary. *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 at 284 (1966). The consideration of standards of proof must extend beyond a simplistic approach that would have criminal cases utilizing proof beyond a reasonable doubt on one hand and all civil matters invoking a lesser burden on the other. Many proceedings result in a substantial loss of freedoms, rights and privileges without the requirement of proof beyond a reasonable doubt. Deportation proceedings [*Woodby, supra*], expatriation proceedings [*Nishikawa* v. *Dulles,* 356 U.S. 129 (1958)], attorney disciplinary proceedings [*In re Bossov, cert. denied* 423 U.S. 928 (1975)], conservatorship proceedings [*Loss* v. *Loss,* 185 N.E.2d 228 (Ill. 1962)] and violation of a municipal ordinance [*City of Chicago* v. *Mayer,* 308 N.E.2d 601 (Ill. 1974)], all require a standard less than proof beyond a reasonable doubt. Even a violation of conditions of probation need not be proved by the strict criminal standard. "This is so even though the individual facing probation revocation may lose his liberty just as swiftly as a defendant in a criminal case" *People* v. *Grayson,* 319 N.E.2d 43 at 46 (Ill. 1974) *cert. denied* 421 U.S. 994 (1975). As cited in *In re Stephenson,* 367 N.E.2d 1273 at 1278 (Ill. 1977).* Surely, the loss of freedoms

* For an elaborate and thorough analysis of this area consult *In re Stephenson,* 367 N.E.2d 1273 at 1278-1279 (Ill. 1977).



associated with a violation of probation and return to a correctional facility for a fixed period of incarceration is no less an infringement than an involuntary hospitalization for mental treatment. Moreover, the deprivation of liberty argument should not be considered without reviewing precisely what "clear and convincing proof" actually means.

In Illinois, the standard of "clear and convincing proof" has been well defined to be a strict burden imposed in serious but civil cases. In a recent discussion of this proof in Illinois, the appellate court citing a line of cases stated:

> "Clear and convincing evidence means proof which should leave no reasonable doubt in the mind of the trier of the facts concerning the truth of the matter in issue." *Interest of Jones,* 340 N.E.2d 269 at 273 (Ill. 1975).

A review of the decided cases discloses a general trend that as the local judicial definition of the civil "clear and convincing" standard approaches the criminal reasonable doubt standard, as in Illinois, then courts have adopted the clear and convincing standard for mental health commitments. This adoption of the strict civil standard usually is accompanied by emphasis upon the civil nature of the proceedings.

On the other hand, where local law defining "clear and convincing" has been unclear, confused with, or equated to the preponderance standard, as in Wisconsin, then those courts have avoided such standard, and adopted the criminal standard of proof beyond a reasonable doubt of the facts necessary for commitment.

We embark on this effort for the purpose of clarification and persuasion in an area of the law which has been

labeled "vexing" by more than one court. See *O'Connor* v. *Donaldson,* 422 U.S. 563, 574 (1975); *Greenwood* v. *U.S.,* 350 U.S. 366, 375 (1956).

Pennsylvania, like Illinois, has a strict civil "clear and convincing" formulation. In *Tapler* v. *Frey,* 184 Pa. Super. 239 132 A.2d 890 (1957) the Pennsylvania court stated:

> "However, the phrases. . . "clear and convincing" . . . as used in these types of cases (deed reformation) have a technical meaning which is that the witnesses must be found to be credible, that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." (Insert for clarity.) *Tapler* v. *Frey,* 184 Pa. Super. at 244-245.

In the face of that formulation we suggest that it is not surprising that the Federal courts in Pennsylvania have adopted the clear and convincing standard, and rejected the burden of proof beyond a reasonable doubt. See *Dixon* v. *Attorney General,* 325 F. Supp. 966, 974 (M.D. Pa. 1971); *Bartley* v. *Kremens,* 402 F. Supp. 1039, 1051-1053 (E.D. Pa. 1975).

Similarly, the Supreme Court of New Mexico ruled in *Matter of Valdez,* 88 N.M. 338, 540 P.2d 818 (1975) that clear and convincing evidence was a sufficient standard in commitment cases. The case refers specifically to *In re Sedillo,* 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972) where the court stated—"For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with the abiding conviction that



the evidence is true." It is submitted that the New Mexico court's formulation of the clear and convincing standard does indeed operate to insure basic fairness to persons sought to be committed.

The Supreme Court of Alabama stated in *Edwards* v. *Sentell,* 282 Ala. 48, 208 So.2d 914, 916 (1968) that:

> "A case of specific performance must be established by clear, definite and unequivocal evidence, and must not leave the contract or any of its terms in doubt, *Borden* v. *Case,* 270 Ala. 293, 118 So.2d 751, 81 A.L.R.2d 982; and merely persuasive evidence is fatal to a claim of specific performance, because complainant's case must be established by evidence that produces a clear conviction in the judicial mind. *Owens* v. *Williams,* 276 Ala. 627, 165 So.2d 709."

Predictably the Alabama Federal District Court adopted the clear and convincing standard in *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala 1974).

Local Iowa law holds that clear and convincing evidence means ". . . that the proof is so established that no reasonable uncertainty or doubt as to the truth thereof confronts the trier of fact." *Miller* v. *Martin,* 246 Iowa 910, 915, 70 N.W.2d 141, 144, (1955); *Greene* v. *Bride & Sons Construction Co.,* 252 Iowa 220, 227, 106 N.W.2d 603, 608 (1960). Thus, the Federal District Court in *Stamus* v. *Leonhardt,* 414 F. Supp. 439, 449 (S.D. Iowa 1976) opted for clear and convincing proof as against proof beyond a reasonable doubt.

On the other hand the Kentucky Supreme Court has defined clear and convincing proof as follows:

> "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince or-

dinarily prudent minded people." *Rowland* v. *Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

The Kentucky Court of Appeals held for proof beyond a reasonable doubt in mental health commitment cases in *Denton* v. *Commonwealth of Kentucky*, 383 S.W.2d 681 (Ky. 1964).

Similarly *In re Pickles Petition*, 170 So.2d 603 (Fla. Dist. Ct. App. 1965) held for the reasonable doubt standard in commitment cases. We suggest the court ruled that way because Florida law is not at all clear on what exactly "clear and convincing" means. *See State* v. *Graham*, 240 So.2d 486, 490-491 *footnote* 17 (1970).

Wisconsin law is extremely muddled and contradictory as to the definition of clear and convincing. Thus the Wisconsin Supreme Court has stated in *Kuehn* v. *Kuehn*, 11 Wis.2d 15, 104 N.W.2d 138, 145 (1960) that:

> "Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

See also: *Madison* v. *Geier*, 27 Wis.2d 687, 692 135 N. W.2d 761, 763 (1964) where the court distinguishes between "clear preponderance of the evidence" as against "fair preponderance of the evidence."



It should come as no surprise then in view of the uncertainty as to the intermediate standard of proof in Wisconsin, that when the Federal Court there was called upon to rule upon the burden of proof to be applied in Mental Health cases, it chose proof beyond a reasonable doubt. See *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972)

It is also interesting to note that *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973) and *Suzuki* v. *Quisenberry*, 411 F. Supp. 1113 (D.Haw. 1976) appear to have no available local "clear and convincing" standard. We suggest that the natural judicial response in such a case is to choose, as between the preponderance standard and the reasonable doubt standard, the stricter criminal standard.

We conclude from the foregoing that those jurisdictions, like Illinois, which have a strict civil standard of clear and convincing proof are in a favorable position both to protect the inalienable right to liberty of their citizens, and to maintain their mental health systems without undesirable criminal overtones. We submit that this Court should hesitate to "criminalize" Illinois mental health commitments by applying rhetorical due process formulations to them.

## III.

## THE ILLINOIS MENTAL HEALTH CODE IS REPLETE WITH PROTECTIONS TO INSURE MAXIMUM CONSTITUTIONAL SAFEGUARDS FOR THE RIGHTS OF THE MENTALLY DISABLED.

On September 5, 1978, Governor James R. Thompson of Illinois signed into law Senate Bills 250, 252, 253, and

255, which, taken in their entirety, comprise the new "Illinois Mental Health Code." This package of bills will become effective January 1, 1979, and will supercede the previously established Illinois Mental Health Code found in the 1977 Illinois Revised Statutes, Chapter 91½ §1-1 *et seq.* This code was one of the most progressive mental health codes in the country at the time of its enactment in 1967 and, supplemented by amendments, has ensured implementation of a comprehensive package of patient rights legislation. However, the new mental health code is a model piece of legislation designed to assure maximum accountability on the part of all service-providers to the mentally disabled for the State, with guarantees of rights, protections and privileges for those mentally handicapped citizens. The new code is equally applicable to the private as well as the public sector, thereby assuring maximum accountability of all service-providers for the first time. The rights of recipients of mental health and developmental disability services are found in Chapter 2, Article 1, entitled "Rights," the full text of which goes from section 2-100 to section 2-111. Following is the full text of the law enumerating those rights.

## CHAPTER II

## RIGHTS OF RECIPIENTS OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES SERVICES

### ARTICLE I. RIGHTS

Section 2-100. No recipient of services shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the State of Illinois, or the



Constitution of the United States solely on account of the receipt of such services.

Section 2-101. No recipient of services shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court. Such determination shall be separate from a judicial proceeding held to determine whether a person is subject to involuntary admission or meets the standard for judicial admission.

Section 2-102. (a) A recipient of services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan, which shall be formulated and periodically reviewed with the participation of the recipient to the extent feasible and, where appropriate, such recipient's nearest of kin or guardian. A qualified professional shall be responsible for overseeing the implementation of such plan.

(b) A recipient of services who is an adherent or a member of any well-recognized religious denomination, the principles and tenets of which teach reliance upon services by spiritual means through prayer alone for healing by a duly accredited practitioner thereof, shall have the right to choose such services. The parent or guardian of a recipient of services who is a minor, or a guardian of a recipient of services who is not a minor, shall have the right to choose services by spiritual means through prayer for the recipient of services.

Section 2-103. Except as provided in this Section, a recipient who resides in a mental health or developmental disabilities facility shall be permitted unimpeded, private, and uncensored communication with persons of his choice by mail, telephone and visitation.

(a) The facility director shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage and telephone usage funds shall be provided in reasonable amounts to recipients who reside in Department facilities and who are unable to procure such items.

(b) Reasonable times and places for the use of telephones and for visits may be established in writing by the facility director.

(c) Unimpeded, private and uncensored communication by mail, telephone, and visitation may be reasonably restricted by the facility director only in order to protect the recipient or others from harm, harassment or intimidation, provided that notice of such restriction shall be given to all recipients upon admission. However, all letters addressed by a recipient to the Governor, members of the General Assembly, Attorney General, judges, state's attorneys, offices of the Department, or licensed attorneys at law must be forwarded at once to the persons to whom they are addressed without examination by the facility authorities. Letters in reply from the officials and attorneys mentioned above must be delivered to the recipient without examination by the facility authorities.

Section 2-104. Every recipient who resides in a mental health or developmental disabilities facility shall be permitted to receive, possess and use personal property and shall be provided with a reasonable amount of storage space therefor, except in the circumstances and under the conditions provided in this Section.

(a) Possession and use of certain classes of property may be restricted by the facility director when necessary to protect the recipient or others from harm, provided that notice of such restriction shall be given to all recipients upon admission.



(b) The professional responsible for overseeing the implementation of a recipient's services plan may, with the approval of the facility director, restrict the right to property when necessary to protect such recipient or others from harm.

(c) When a recipient is discharged from the mental health or developmental disabilities facility, all of his lawful personal property which is in the custody of the facility shall be returned to him.

Section 2-105. A recipient of services may use his money as he chooses, unless he is a minor or prohibited from doing so under a court guardianship order. A recipient may deposit or cause to be deposited money in his name with a service provider or financial institution with the approval of the provider or financial institution. Money deposited with a service provider shall not be retained by the service provider. Any earnings attributable to a recipient's money shall accrue to him.

Except where a recipient has given informed consent, no service provider nor any of its employees shall be made representative payee for his social security, pension, annuity, trust fund, or any other form of direct payment or assistance.

When a recipient is discharged from a service provider, all of his money, including earnings, shall be returned to him.

Section 2-106. A recipient of services may perform labor to which he consents for a service provider, if the professional responsible for overseeing the implementation of the services plan for such recipient determines

that such labor would be consistent with such plan. A recipient who performs labor which is of any consequential economic benefit to a service provider shall receive wages which are commensurate with the value of the work performed, in accordance with applicable federal and state laws and regulations. A recipient may be required to perform tasks of a personal housekeeping nature without compensation.

Wages earned by a recipient of services shall be considered money which he is entitled to receive pursuant to Section 2-105, and such wages shall be paid by the service provider not less than once a month.

Section 2-107. An adult recipient of services, or, if the recipient is under guardianship, the recipient's guardian, shall be given the opportunity to refuse generally accepted mental health or developmental disability services, including but not limited to medication, unless such services are necessary to prevent the recipient from causing serious harm to himself or others. If such services are refused, they shall not be given. The facility director shall inform a recipient or guardian who refuses such services of alternate services available and the risks of such alternate services, as well as the possible consequences to the recipient of refusal of such services.

Section 2-108. Restraint may be used only as a therapeutic measure to prevent a recipient from causing physical harm to himself or others. In no event shall restraint be utilized to punish or discipline a recipient, nor is restraint to be used as a convenience for the staff.

(a) Except as provided herein, restraint shall be employed only upon the written order of a physician. No restraint shall be ordered unless the physician, after personally observing and examining the recipient, is clinically satisfied that the use of restraint is justified to prevent the recipient from causing physical harm to himself or others. The order shall state the events leading up to the need for restraint and the purposes for which such restraint is employed. The order shall also state the length of time restraint is to be employed and the clinical justification for such length of time. No order for restraint shall be valid for more than 12 hours. If further restraint is required, a new order must be issued by a physician pursuant to the requirements provided herein.



(b) In the event there is an emergency requiring the immediate use of restraint, it may be ordered temporarily by a qualified person only where a physician is not immediately available. In such event, a written order of a physician shall be obtained pursuant to the requirements of this Section as quickly as possible, but in no event later than 8 hours after the initial employment of such emergency restraint; and whoever orders restraint in such emergency situations shall document its necessity and place that documentation in the patient's record.

(c) The person who orders restraint shall inform the facility director in writing of the use of restraint as soon as practicable.

(d) The facility director shall review all restraint orders daily and shall inquire into the reasons for the orders for restraint by any person who routinely orders them.

(e) Restraint may be employed during all or part of one 24 hour period, such period commencing with the initial application of the restraint. However, once restraint has been employed during one 24 hour period, it shall not be used again on the same recipient during the

next 2 following calendar days without the prior written authorization of the facility director.

(f) Restraint shall be employed in a humane and therapeutic manner. Specifically, unless there is an immediate danger that the recipient will physically harm himself or others, restraint shall be loosely applied to permit freedom of movement. Further, the recipient shall be permitted to have regular meals and toilet privileges free from such restraint, except when freedom of action may result in physical harm to the recipient or others.

Section 2-109. Seclusion may be used only as a therapeutic measure to prevent a recipient from causing physical harm to himself or others. In no event shall seclusion be utilized to punish or discipline a recipient, nor is seclusion to be used as a convenience for the staff.

(a) Seclusion shall be employed only upon the written order of a physician. No seclusion shall be ordered unless the physician, after personally observing and examining the recipient, is clinically satisfied that the use of seclusion is justfied to prevent the recipient from causing physical harm to himself or others. The order shall state the events leading up to the need for seclusion and the purposes for which such seclusion is employed. The order shall also state the length of time seclusion is to be employed and the clinical justification for such length of time. No order for seclusion shall be valid for more than 8 hours. If further seclusion is required, a new order must be issued by a physician pursuant to the requirements provided herein.

(b) The physician who orders seclusion shall inform the facility director in writing of the use of seclusion as soon as practicable.



(c) The facility director shall review all seclusion orders daily and shall inquire into the reasons for the orders for seclusion by any physician who routinely orders them.

(d) Seclusion may be employed during all or part of one 8 hour period, such period commencing with the initial application of the seclusion. However, once seclusion has been employed during one 8 hour period, it shall not be used again on the same recipient during the next 2 following calendar days without prior written authorization of the facility director.

(e) The physician who ordered the seclusion shall assign a qualified person to observe the secluded recipient at least every 15 minutes. Such qualified person shall maintain a record of such observations.

(f) Safety precautions shall be followed to prevent injuries to the recipient in the seclusion room. Seclusion rooms shall be adequately lighted, heated, and furnished. If a door is locked, someone with a key shall be in constant attendance nearby.

Section 2-110. No recipient of services shall be subjected to electro-convulsive therapy, or to any unsual, hazardous, or experimental services or psychosurgery, without his written and informed consent.

If the recipient is a minor or is under guardianship, such recipient's parent or guardian is authorized, only with the approval of the court, to provide informed consent for participation of the ward in any such services which the guardian deems to be in the best interest of the ward.

Section 2-111. A medical or dental emergency exists when delay for the purpose of obtaining consent would

endanger the life or adversely and substantially affect the health of a recipient of services. When a medical or dental emergency exists, if a physician or licensed dentist who examines a recipient determines that the recipient is not capable of giving informed consent, essential medical or dental procedures may be performed without consent. No physician nor licensed dentist shall be liable for a non-negligent good faith determination that a medical or dental emergency exists.

In addition to the rights elicited in Article I above, under Article II entitled "Procedures", dissemination, distribution, and implementation of those rights is guaranteed in Sections 2-200 through 2-202 which states as follows:

Section 2-200. Upon commencement of services, every recipient who is 12 years of age or older and the parent or guardian of a minor or person under guardianship shall be informed orally and in writing of the rights guaranteed by this Chapter. A summary of these rights shall also be posted conspicuously in public areas of every facility that provides service.

Section 2-201. Whenever any rights of a recipient of services that are specified in this Chapter are restricted, the professional responsible for overseeing the implementation of the recipient's services plan shall be responsible for promptly giving notice of the restriction or use of restraint or seclusion and the reason therefor to:

(a) the recipient and, if such recipient is a minor or under guardianship, his parent or guardian:

(b) a person designated by the recipient upon commencement of services or at any later time to receive



such notice, or if no such person is designated, the nearest relative of the recipient; and

(c) the Guardianship and Mental Health Advocacy Commission, if the recipient so designates.

The professional shall also be responsible for promptly recording such restriction or use of restraint or seclusion and the reason therefor in the recipient's record.

Section 2-202. The Director of the Department and the facility director of each service provider shall adopt in writing such policies and procedures as are necessary to implement this Chapter. Such policies and procedures may amplify or expand, but shall not restrict or limit, the rights guaranteed to recipients by this Chapter.

In Chap. I entitled "Definitions", Section 1-119 entitled "Person subject to involuntary admission" or "subject to involuntary admission" is defined as:

> 1. A person who is mentally ill and who, because of his illness, is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
>
> 2. A person who is mentally ill and who, because of his illness, is unable to provide for his basic physical needs so as to guard himself from serious harm.

When any person is presented for admission to a mental health facility under this subsection within seven (7) days thereafter, the facility shall provide or arrange for a comprehensive physical and mental examination and social investigation of that person. This examination shall be used to determine whether some program other than hospitalization will meet the needs of such person with preference being given to care or treatment in his own community. The foregoing definition of a person in

need of mental treatment taken in conjunction with Article VIII entitled "Court Hearings", illustrates that the current Illinois Mental Health Code is replete with protections to assure that the rights of an individual are protected by:

—allowing hearings to be held in the mental health facility where the respondent is hospitalized. (Section 3-800)

—entitling the respondent to a jury trial (Section 3-802)

—court appointment of one or more physicians, qualified examiners, clinical psychologists, or other experts, to examine the respondent. (Section 3-803)

—allowing the respondent to secure an independent examination by a physician, qualified examiner, clinical psychologist, or other expert, even if the individual is unable to pay for the same. (Section 3-804)

—assuring rights to counsel in every case of civil commitment whether or not the respondent is able to pay for the same services. (Section 3-805)

—guaranteeing respondent his right to be present at any hearing under this Act. (Section 3-806)

—assuring that a respondent may not be found subject to involuntary admission. (Section 3-807)

—guaranteeing a respondent that a treatment plan shall be provided, including a report on appropriateness and availability of alternative treatment settings, social investigation of respondent, and a treatment plan which shall describe the respondent's problems and needs, the treatment goals, the proposed treatment methods, and a projected time table for their attainment. (Section 3-810)

—the court shall consider alternative mental health facilities, using the least restrictive alternative settings for treatment which is appropriate in all cases (Section 3-811)



—establishes an initial order for hospitalization which shall be for a period not to exceed 60 days. After that, every 180 days further review and treatment plan must be established and resubmitted to the court in order to continue hospitalization. (Section 3-813)

—all final court orders must be in writing and accompanied by a statement on the record of the court findings and facts and conclusions of law which must be presented to the patient. Also an appeal from any final order may be taken in the same manner as in any other civil cases, and the court must notify the patient orally and in writing of his right to appeal and inform him of his right to a free transcript and counsel if, in fact, he is indigent. (Section 3-816)

Senate Bill 252 is the amendment to the current Probate Act. The Act sets up the guidelines for appointing guardians for persons whose legal rights have been impaired or for those people who lack sufficient understanding or capacity to make or communicate responsible decisions concerning the care of their persons or estates. The appointment provisions guarantee that the highest standards of care will be utilized in ascertaining and appointing appropriate persons to act in the capacity of guardian for a mentally ill or mentally disabled individual in the confines of the State of Illinois. The different types of guardians, in addition to the different types of guardianship are clearly enumerated, along with the duties of the prospective guardian. Senate Bill 252, taken in conjunction with Senate Bill 253, which establishes the Office of the Guardian, clearly assures that all individuals lacking legal rights will have an appropriate guardian appointed, whose duties and responsibilities are clearly designated by statute to assure that the rights and well-being of a given patient are thoroughly protected.

In addition to creating the Office of the Guardian, Senate Bill 253 also provides for the establishment of the Mental Health & Developmental Disabilities Legal Advocacy Service and the Human Rights Authority. Inasmuch as this Bill creates a special state agency supervised by a board of nine members appointed by the Governor, it is truly a unique and model method for assuring proper patient care and treatment in both the public and private sectors of this State. The Office of the State Guardian was established to achieve a flexible and rational protective service structure, particularly for the mentally disabled citizenry reaching the age of majority. At present, an adjudication of legal incompetency (to be distinguished from a finding that a person is in need of mental treatment) results in the loss of all civil rights. There is no flexibility in the appointment of a conservator for the most part, and the resultant loss of civil rights authorizes the conservator to assume all authority over his ward. The existing conservator structure was criticized as being designed primarily for the affluent.

In response to this criticism, the model legislation recently signed by Governor Thompson creates a relatively easy and responsive process, wherein the court can fashion its guardianship order commensurate with the needs and abilities of the mentally disabled person. Patients' civil rights are protected to the full extent possible in light of the circumstances under which they were hospitalized. The court order respects the authority of the guardian and the rights of the disabled person. Interested parents and family members continue to have priority in the appointment process. Where there are no available or interested family members to serve as conservator, the newly created Office of the State Guardian



assumes that role and, in addition, counsels families and relatives. Procedural due process is provided by requiring the appointment of a guardian ad litem with expertise in dealing with the mentally disabled, and, under certain circumstances, by additional appointment of legal counsel to represent the mentally disabled person. This model legislation meets a long-standing need; it is responsive to the immediate concerns of families of mentally disabled persons and to the future interests of the patient, to protect him when his parents or family die or are disabled.

The Mental Health & Developmental Disabilities Legal Advocacy Service works to meet the need for appointing counsel in all cases where the mentally disabled are present. The need for counsel is apparent in involuntary hospitalization proceedings—but is equally important in other areas. These areas include effective advocacy on behalf of mentally disabled adults and children who are being denied admission or who may be inappropriately transferred or prematurely discharged from the public sector. They also include enforcement of the rights of the mentally disabled against the public and private agencies mandated to provide services. The Federal government has already mandated in the current developmental disability legislation, that states must provide an advocacy component for developmentally disabled clients which is independent of the service provided. The new legislation for Illinois is not only enlightened and in compliance with the Federal trend, but is also designed to pragmatically insure that mentally disabled persons receive those services which the legislature has mandated to be provided.

In addition, the advocacy service is designed to afford services of a private nature for institutionalized patients. These services include providing legal assistance in real-estate transactions, divorce actions, personal estate matters, or any of a multitude of legal problems which may be involved in the day-to-day life of an individual patient.

The Human Rights Authority legislation is a companion to and acts in tandem with the Legal Advocacy Service. It will consist of interested professionals and consumers who will investigate, through their own initiative or in response to complaints, alleged abuses against mentally disabled recipients of services. Many of these human rights groups already exist informally in some institutions in the public sector and are composed of interested parents, relatives and some professional staff-particularly in developmental disabilities institutions. The new law formally and statutorily creates a Human Rights Authority with the ability to effectively monitor and resolve complaints.

Senate Bill 225 deals with confidentiality of mental health records. The current Illinois statutes accord a privilege of confidentiality to only certain designated therapeutic professionals, namely: physicians, psychiatrists, certified social workers and registered psychologists. This new legislation protects communications of not only those professionals previously concerned, but also extends the veil of privilege to communications with other persons who provide necessary services.

In addition, the new law specifically expands the right of a person who receives mental health or developmental disability services to have access to his own records.



The act requires that before disclosure of a record of a confidential nature, the patient give an informed consent. The elements of a consent form are set forth in the new law, and limited exceptions permit disclosure without informed consent, under extraordinary circumstances. Similarily, exceptions to the privilege of confidentiality in judicial and administrative proceedings are defined and limited, such as: civil competency to manage one's own affairs; fitness to stand criminal trial; legal action brought under the Confidentiality Act itself; and proceedings based on child abuse and neglect. The new code further provides that a court considering the applicability of a privilege or any exceptions thereto is authorized to enter protective orders to exclude irrelevant information and to inspect and examine confidential material in camera.

## CONCLUSION

The People of the State of Illinois have a deep and compelling interest in the decision of this Court. This State has consistently strived to maintain the optimum balance between the rights of patients and society in general through its progressive legislation and programs for the mentally disabled. The stringent standard of commitment required by Illinois law, when coupled with the rights of review—both administrative and judicial—and the local definition of "clear and convincing proof" provide for a viable, reasonable, and Constitutional Mental Health Code. A decision by this Court with applications to Illinois and other progressive states might act to prevent those in need of treatment from obtaining needed clinical intervention. For the foregoing reasons,

*amicus curiae,* the State of Illinois, respectfully urges this Court to limit its holding in this cause and find that the due process clause does not require the application of "proof beyond a reasonable doubt" in all mental commitment cases.

Respectfully submitted,

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